

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6061

United States Court of Appeals

FOR THE SECOND CIRCUIT

DOCKET NO. 77-6061

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff-Appellant
against

THE CHASE MANHATTAN BANK (NATIONAL ASSOCIATION),
Defendant-Appellee

*On Appeal From the United States District Court
for the Southern District of New York*

**BRIEF OF DEFENDANT-APPELLEE
THE CHASE MANHATTAN BANK
(NATIONAL ASSOCIATION)**

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-6061

RAY MARSHALL, Secretary of Labor, United States
Department of Labor,

Plaintiff-Appellant,

v.

THE CHASE MANHATTAN BANK (NATIONAL ASSOCIATION),
Defendant-Appellee.

On Appeal From The United States District Court
For the Southern District of New York

BRIEF OF DEFENDANT-APPELLEE THE
CHASE MANHATTAN BANK (NATIONAL
ASSOCIATION)

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	3
ISSUE PRESENTED FOR REVIEW	4
STATEMENT OF THE CASE	4
Pleadings and Disposition Below	4
Merits of the Secretary's Jurisdictional Contentions	8
ARGUMENT	11
I. THE COMPLAINT DID NOT STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED	12
II. ABSTENTION WOULD BE PROPER IN THIS CASE	16
III. REASONS OF COMITY AND EFFICIENT JUDICIAL ADMINISTRATION REQUIRED THAT THIS ACTION BE DISMISSED	17
CONCLUSION	19
ADDENDA	
Appellee's submission to Judge Gellinoff	A1-A6
Appellant's submission to Judge Gellinoff	A7-A16

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases:</u>	
<u>Ahrensfield v. Stephens</u> , 528 F.2d 193 (7th Cir. 1975)	17
<u>Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers</u> , 398 U.S. 281 (1970)	12, 16
<u>Capital Services, Inc. v. NLRB</u> , 347 U.S. 501 (1954)	14
<u>Colorado River Water Conservation District v. United States</u> 424 U.S. 800 (1976)	17
<u>FPC v. Corporation Commission of Oklahoma</u> , 362 F.Supp. 522 (W.D. Okla. 1973)	15
<u>Juidice v. Vail</u> , 97 S.Ct. 1211 (1977)	17
<u>Mitchum v. Foster</u> , 407 U.S. 225 (1972)	15
<u>NLRB v. Nash-Finch Co.</u> , 404 U.S. 138 (1971)	14
<u>Samuels v. Mackell</u> , 401 U.S. 66 (1971)	16
<u>Ungar v. Mandell</u> , 471 F.2d 1163 (2d Cir. 1972)	16
<u>United States v. City of New Haven</u> , 367 F.Supp. 1338 (D. Conn. 1973)	15
<u>Statutes:</u>	
<u>Employee Retirement Income Security Act of 1974 (ERISA)</u> , 29 U.S.C. 1001 <u>et seq.</u>	5
Section 3(2), 29 U.S.C. 1002(1)	10
Section 3(3), 29 U.S.C. 1002(2)	10
Section 4(a), 29 U.S.C. 1003(a)	7, 9, 10
Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B)	9
Section 4021, 29 U.S.C. § 1321	11

ISSUE PRESENTED FOR REVIEW

Whether the District Court properly dismissed an action by the Secretary of Labor ("the Secretary") to enjoin The Chase Manhattan Bank (National Association) ("Chase") from maintaining, in part, a proceeding in state court with respect to the pension plan of a defunct corporation, where the sole basis for the Secretary's action was an alleged lack of state court jurisdiction which could be challenged in the state court proceeding.

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Southern District of New York (Griesa, J.) dated January 24, 1977 (172*) which dismissed an action for declaratory and injunctive relief on the ground that the only appropriate way for the Secretary to proceed was to make a motion in the state court to dismiss.

Pleadings and Disposition Below

The Complaint (2-7), filed in December 1976, purportedly to enforce the provisions of Title I of the

* Page references are the the Joint Appendix on this appeal.

Employee Retirement Income Security Act of 1974 ("ERISA") (29 U.S.C. § 1001 et seq.), annexes a petition (8-77) and intermediate account (78-145) filed by Chase in July 1976 to commence a proceeding in the Supreme Court of the State of New York, County of New York, and seeks declaratory and injunctive relief with respect to certain limited aspects of that state court proceeding. Specifically, judgment is sought (a) declaring that the post-1974 portion of Chase's account is a "cause of action which relates to an employee benefit plan covered by ERISA and which arose after January 1, 1975", (b) declaring that "the Supreme Court of New York in and for the County of New York lacks jurisdiction over that portion of the state court proceeding", and (c) "enjoin[ing] Chase from pursuing in the state court any claim relating to an employee benefit plan covered by ERISA which arose after January 1, 1975." (5-6)

The complaint does not seek to enforce the terms of any employee benefit plan, nor does it allege a violation of ERISA by Chase or anyone else. Rather, it poses (and purports to answer) the theoretical question of whether the state court's authority extends to the entire proceeding pending before it, or whether, by reason of ERISA, the state court lacks subject matter jurisdiction over a portion of that proceeding. It is not alleged that

this question was resolved improperly by the state court, or even that the Secretary saw fit to present it. Instead, there is only a bare allegation that "[u]nless restrained by this Court, . . . the state court may render a judgment purporting to grant the relief sought by Chase . . . notwithstanding that the state court is without jurisdiction" [emphasis supplied] (Complaint ¶ 9 at 5) and assertion that this purely hypothetical contingency -- a partially void state court judgment -- would "complicate and burden the Secretary's enforcement and administration of ERISA" and "result in irreparable injury to the public interest" by "causing confusion" among plan participants and "trustees and administrators" of other plans who might "rely improperly on the expectation that their responsibilities under ERISA . . . may be determined in such proceedings" (Complaint ¶ 11 [sic]). The nub of the Secretary's contention is that no state court can be trusted to reach a correct result in construing the jurisdictional provisions of ERISA.

Chase's answer (146-147) admits the facts set forth in its petition to the state court, denies that the state court lacks jurisdiction of its accounting for the year 1975, and asserts four affirmative defenses: (1) that the plan in question is not covered by ERISA, by

reason of the limiting language in 29 U.S.C. § 1003(a), (2) that coverage could not constitutionally extend to such a plan in the manner alleged by the Secretary, (3) that the complaint fails to state a claim upon which relief can be granted and (4) that the federal court should abstain from consideration of the Secretary's jurisdictional contentions until the state court has ruled upon them.

Shortly after issue was joined, the matter came on before Judge Griesa at a conference initiated by the Secretary to discuss a contemplated application for preliminary injunctive relief. The transcript of that conference (154-170) reveals a thorough consideration of the Secretary's arguments, both on the merits and in support of the asserted need for federal court intervention prior to any determination by the state court. Particular attention was paid to the fact that "[t]his is not a very big fund" and that only one small "aspect" of state court jurisdiction was challenged by the Secretary (164). Focusing on the Secretary's refusal to pursue his jurisdictional contentions in the state courts, and unimpressed with the assertion that to do so would "unravel the whole fabric of ERISA" (169), the District Court dismissed the action, without

reaching the merits of those contentions.

Merits of the Secretary's Jurisdictional Contentions

Although the merits need not be at issue on this appeal, and the District Court's order preserves the Secretary's right to assert those contentions in any appropriate forum, a brief response to the Secretary's characterizations of Chase's position seems in order. Appended hereto are copies of the correspondence with the state court referred to in the footnote at page 8 of the Secretary's brief.* As set forth therein, Chase believes that even if

* Contrary to the suggestion in the Secretary's brief, made for the first time on this appeal, the state court's non-response to counsels' letters and appointment of a guardian ad litem does not amount to a determination of the limited jurisdictional issue to which that correspondence was addressed. Indeed, it is presumptuous for counsel to suggest that sending such a letter to a busy state court judge constitutes an appropriate effort "to secure from . . . the state court some action which would terminate [a] portion of the suit." (Secretary's brief, page 8) Similarly, the Secretary's repeated contentions that "Chase wished to effect a termination of the plan" (Br., p. 7) are unsupported in the record. In fact, the participants seek distribution of this fund (10-11), and Chase seeks to effectuate their wishes at a minimum of unnecessary litigation expense (11-12). The Secretary's glib reference to "adherence to fiduciary standards" (166) furnishes no guidance at all in a case where, as here, Chase lacks distribution authority or any factual basis for determining participants' interests (9-10). As recognized by Judge Griesa it is "not an outlandish concept" for "somebody besides Chase [to] tell it that it can do these things" (166) and this Court should be most reluctant to find a back-handed Congressional overruling of centuries of trust law practice and procedure in this regard.

ERISA applies to the Federal Sweets Plan, it does not operate to preclude state court consideration of any issue arising from Chase's petition.

It is uncontested by the Secretary or any participant that the plan has been inactive since April 1972, so far as any company participation is concerned. In fact, the corporate existence of Federal Sweets was terminated in April 1973 (49) and claims by participants for payments by reason of termination of the plan ripened into causes of action at that time. In affording the participants a state court forum for the assertion of those and any other claims, cognizable under 29 U.S.C. § 1132(a)(1)(B), Chase has properly endeavored to minimize the judicial time and litigation expense necessary to wind up a plan as to which ERISA is at most only partially applicable.

Chase contends, moreover, that in fact ERISA is inapplicable by its terms to plans not "maintained" after its effective date by employers or employees in commerce. The Secretary's reading of the statute in this regard (Brief, p. 21, footnote) would render superfluous the operative language of 29 U.S.C. § 1003(a) extending coverage to an "employee benefit plan if it is

established or maintained . . ." [emphasis supplied].
(Compare the definitions in §§ 1002 (1) and (2) each of which specifically describes a "plan . . . which was heretofore or is hereafter established or maintained . . .") The words "if it is" plainly connote a limitation of any preceding generalities, and §§ 1002 (1) and (2) make clear the significance of the present tense "is" in this context. If the reference in § 1003(a) to plans "established or maintained" was intended to be merely superfluously descriptive, the words "if it is" could just as well have been omitted from this subsection.

Both the rule of construction which requires that effect be given, if possible, to each word of a statute and the presumption that the legislature has shown proper respect for applicable constitutional restraints on its powers, point to the conclusion that ERISA was not intended to apply to plans which might have previously been, but were no longer at enactment date, maintained by employers or employee organizations "engaged in commerce . . . or activity affecting commerce."

Chase's reading of § 1003(a) is consistent with the ruling of the Pension Benefit Guaranty Corporation that by reason of the cessation of "the indicia of plan

activity" prior to the ERISA effective date of September 2, 1974, PBGC has no interest in the termination proceedings initiated by Chase. (See appended letter of Christine O. Cook, dated August 23, 1976.) The operative language of § 1321 -- "any plan . . . which for a plan year . . . is an employee pension benefit plan (as defined in paragraph (2) of section 1002 of this title) established or maintained by an employer engaged in commerce . . ." -- is, if anything, more amenable to the Secretary's argument that the present tense "is" is merely designed to incorporate the past tense "was" in the definitions. Yet PBGC found the lack of plan activity after the ERISA effective date determinative of its lack of administrative jurisdiction.

ARGUMENT

The District Court properly dismissed this action, since the complaint did not state a claim upon which relief could be granted. Had the district court abstained, such abstention would have been proper. Moreover, dismissal demonstrated a proper respect for comity between the Federal and state courts, and for efficient judicial administration. Accordingly, the District Court's judgment of dismissal should be affirmed.

1. THE COMPLAINT DID NOT STATE A CLAIM UPON WHICH RELIEF
COULD BE GRANTED.

The Federal anti-injunction statute, 28 U.S.C.

§ 2283 provides:

"A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The Supreme Court recently considered the background and policy underlying the anti-injunction statute in Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970). The court stated that one of the powers reserved to the states was "the maintenance of state judicial systems for the decision of legal controversies." 398 U.S. at 285. In response to pressures for lines of demarcation between the federal and state systems, Congress passed the anti-injunction Act. Furthermore, the Court stated that the Act is a "binding rule on the power of the federal courts," 398 U.S. at 286, rather than a mere statement of a general policy of comity. Because the purpose of the anti-injunction statute has constitutional underpinnings, the Court held that the three specific exceptions "should not be enlarged by loose statutory construction." 398 U.S. at 287. Because none of the three

exceptions are satisfied in this case, the anti-injunction statute prevents the District Court from enjoining the state proceedings.

Several cases have noted an implied exception to the anti-injunction statute where a federal agency seeks to enjoin state court action in an area pre-empted by federal law. Those cases are distinguishable for two basic reasons. First, in those cases the action to be taken by the state court would have conflicted with an area clearly pre-empted by the federal law. In the present case, however, it is certainly arguable that ERISA does not apply to pension plans that have been defunct since before 1975. Furthermore, the question which the Secretary seeks to enjoin the state court from deciding is the question of its jurisdiction to hear the case. Resolution of this issue will not interfere with the Labor Department's enforcement of ERISA, particularly if the state court determines that it has no jurisdiction.

The second point of distinction between the "implied exception" cases and the present case is the fact that in those cases the state court had already taken some action having the effect of treading on pre-empted ground. In the present case, however, the state court has done nothing so far to interfere with ERISA's purported pre-

emption of the field, and a decision as to whether it has jurisdiction would not so interfere. Consideration of the "implied exception" cases reveals these distinguishing features. In NLRB v. Nash-Finch Co., 404 U.S. 138 (1971), the Supreme Court ordered a district court to enjoin enforcement of or proceedings under a state court's injunction against union picketing, because the state court injunction would have clearly interfered with the Board's enforcement of the National Labor Relations Act. In that case, too, the state court had already issued the injunction, and the danger of interference with the federal plan was far more immediate than in the present case. A similar result was reached in Capital Services, Inc. v. NLRB, 347 U.S. 501 (1954), but in that case the Court found the injunction to be necessary in aid of the federal court's jurisdiction. In the present case, however, the state court's determination of its jurisdiction will not in any way interfere with the federal court's jurisdiction. Indeed, to the extent that the state court proceeding is in the nature of a fiduciary accounting, there is arguably no federal jurisdiction under ERISA with which the state proceeding could interfere, even if ERISA applied to this plan.

In United States v. City of New Haven, 367 F.Supp. 1338 (D. Conn. 1973), a state court had declared the city in contempt for using a portion of an airport runway without obtaining the approval of the neighboring municipality. The United States, asserting the supremacy of the Federal Aviation Act, sought to keep the runway open, and therefore obtained an injunction against enforcement of the state court order. In that case, too, the state court had already taken an action in direct contravention of a recognized federal pre-emptive scheme. Similarly, in FPC v. Corporation Commission of Oklahoma, 362 F.Supp. 522 (W.D. Okla. 1973), the FPC obtained an injunction against state court enforcement of a commission order conflicting with the FPC's enforcement of the Natural Gas Act. For the reasons discussed above, this case is also distinguishable.

As the Supreme Court noted in Mitchum v. Foster, 407 U.S. 225 (1972), the implied exception to the anti-injunction act exists only where the federal agency is asserting a validly superior federal interest. It is not, however, a blanket exception for every injunction sought by a federal regulatory agency. Because in the present case state court determination of its jurisdiction will not interfere with the enforcement of ERISA, the implied exception is not applicable, and furthermore, because none

of the three express exceptions have been satisfied the anti-injunction statute will apply. Dismissal was therefore proper on the ground that the District Court lacked authority to enjoin the state proceeding.

In the present case, the injunction was sought against Chase rather than against the state court itself. This is of no import, however, because it is well recognized that the anti-injunction statute applies even where the injunction is directed at a party other than the state court. Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers, supra; Ungar v. Mandell, 471 F.2d 1163 (2d Cir. 1972). Furthermore, the anti-injunction policy also prohibits federal courts from issuing declaratory judgments having a practical injunctive effect. Samuels v. Mackell, 401 U.S. 66 (1971). Thus, because the Secretary sought injunctive and declaratory relief, both of which are barred by 28 U.S.C. § 2283, he has not applied for any relief which the court was empowered to grant. For this reason, his complaint was properly dismissed for failure to state a claim upon which relief could be granted.

II. ABSTENTION WOULD BE PROPER IN THIS CASE

The Supreme Court has recently set forth the criteria that justify abstention by federal district courts

for cases in which federal questions may be determined or avoided in state court proceedings. One important justification for abstention is that the parties be given an opportunity to present their federal claims to the state courts. Juidice v. Vail, 97 S.Ct. 1211 (1977); Ahrensfield v. Stephens, 528 F.2d 193 (7th Cir. 1975). In the present case, the Secretary argues that ERISA strips the state court of jurisdiction. This claim, based on a federal statute, may be presented to the state court in contending that the state court lacks jurisdiction. It is clear that the Secretary is a party to the state court proceeding, because he claims an interest in the pension fund under his authority to enforce ERISA. Thus, because an ongoing state court proceeding offers the Secretary an opportunity to fully litigate his federal claim, the District Court would be justified in invoking the abstention doctrine in the present case.

III. REASONS OF COMITY AND EFFICIENT JUDICIAL ADMINISTRATION REQUIRED THAT THIS ACTION BE DISMISSED.

As the Supreme Court noted in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), a federal action is properly dismissable where considerations of the conservation of judicial resources are present. 424 U.S. at 817. The Court noted that although no one factor is determinative

on the question of dismissal the relevant criteria include:

"the inconvenience of the federal forum, . . . the desirability of avoiding piecemeal litigation, . . . and the order in which jurisdiction was obtained by the concurrent forums. . . ." 424 U.S. at 818 (cites omitted).

In the present case, it is clear that all three criteria supporting dismissal are present. The federal forum is inconvenient because, as the Secretary concedes, the state court proceeding must necessarily continue with respect to the use of the pension trust funds prior to 1975. If the state court determines its jurisdiction with respect to the period raised in the Secretary's complaint, no federal proceedings would be necessary. On the other hand, even if a federal court decides the jurisdictional question, the state court proceedings for the earlier period would continue, and no judicial time would be saved. Only by dismissing this action can judicial resources be conserved and needless litigation avoided. For this reason, the federal forum is inconvenient.

Similarly, because the state court proceedings will continue with respect to the pre-1975 accounting, piecemeal litigation will necessarily result unless the federal action is dismissed. This factor, too, has been satisfied in favor of dismissal.

Finally, it is clear that the state court

obtained jurisdiction before this action was brought in the District Court. Thus, all three factors favoring dismissal for reasons of judicial administration have been satisfied in the present case.

The District Court's order recognized that judicial administration would be promoted by dismissing this suit, because the state courts are clearly capable of determining whether they have jurisdiction in the present case. Thus under the Supreme Court standards for promoting effective judicial administration and the principles of comity which allow state courts to determine their own jurisdiction, this action was properly dismissed.

CONCLUSION

Because the complaint did not state a claim upon which relief could have been granted, because abstention would have been proper in the present case, and because of considerations of judicial administration and comity, the District Court properly dismissed this action. For these reasons, the District Court's order should be affirmed.

Dated: New York, New York
June 3, 1977

Respectfully submitted,

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Association)
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(212) 422-2660

Addendum 1

MILBANK, TWEED, HADLEY & McCLOY

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NEW YORK, N. Y. 10005

TELEPHONE: 2-2 HANOVER 2-2660

TELEX 12-5595

I. T. T. 422962

CABLE ADDRESS: MILTWEED NEW YORK

MIDTOWN OFFICE
1211 AVENUE OF THE AMERICAS
NEW YORK, N. Y. 10036
212 HANOVER 2-2660

October 7, 1976

Re: In the Matter of the Application of The
Chase Manhattan Bank (National Association),
as Trustee under the Provisions of a Trust
Agreement with Federal Sweets and Biscuit
Co., Inc. Supreme Court of the State of
New York Index No. 13554-76

Hon. Abraham J. Gellinoff
New York County Courthouse
60 Centre Street
New York, New York

Dear Judge Gellinoff:

By letter to you dated September 30, 1976, an attorney in the U.S. Department of Labor has advised that, in his department's view, the Court lacks jurisdiction of so much of the petition in the captioned proceeding as seeks judicial settlement of our client's intermediate account for the calendar year 1975. We disagree with this view for the following reasons.

1. 29 U.S.C. § 1144 deals solely with the question of the applicable law (state, federal, or some of each) and does not oust any State court of its jurisdiction to apply that law.

2. The language of § 1144(b)(1) -- excluding from federal preemption "any cause of action which arose, or any act or omission which occurred, before January 1, 1975" (emphasis added) -- suggests on its face that there are acts and omissions contemplated to occur after that date as to which all state laws will continue to apply.

3. The facts of this case, as recited in the petition and uncontested by any interested party, are that our client has received no directions with respect to distributions from this trust since April 1972. Accordingly, participants' causes of action for distribution of the principal of the trust arose well before 1975.

4. Even claims for benefits which arose after 1975 would be cognizable in an appropriate State court under 29 U.S.C. § 1132 (a)(1)(B) and (e)(1). Leonardis v. Local 282 Pension Trust Fund 391 F. Supp. 554 (E.D.N.Y. 1975).

5. Chase's application to this Court merely seeks to afford plan participants a convenient forum for asserting such claims and is not a civil action "under this subchapter" for purposes of § 1132(e)(1).

6. The views advanced by the Department of Labor in its recent correspondence are contrary to

(a) its previously expressed intention to "terminate our interest in this case as soon as you

Addendum 3

-3-

initiate formal proceedings" (March 18, 1976 letter from Regional Administrator Naumoff to John H. Kelly of our firm, copy enclosed) and

(b) a formal ruling by the Pension Benefit Guaranty Corporation that, for purposes of the Employee Retirement Income Security Act, the subject pension plan terminated well before September 1974 (copy of August 23, 1976 ruling enclosed).

We have discussed the Labor Department's view with counsel for various participants and believe they share our disagreement with it. As a practical matter, we see no purpose to be served by piecemeal judicial treatment of this proceeding and respectfully suggest that your Honor should afford little weight to the comments of a department whose fluctuating views are in conflict with those of another federal agency, and which has elected not to appear.

Very truly yours,

Kenneth A. Perko, Jr.

KAP:mk

cc: Harold Goldman, Esq.
William Goodstein, Esq.
Steven J. Sacher, Esq.

Enclosures



Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C. 20006

AUG 23 1976

Kenneth A. Perko, Esq.
Milbank, Tweed, Hadley & McCloy
1 Chase Manhattan Plaza
New York, NY 10005

Re: Pension Plan for Wage Employees of
Federal Sweets & Biscuit Co., Inc.

Dear Mr. Perko:

Thank you for your letters of August 4 and 10, 1976. The Pension Benefit Guaranty Corporation (the "PBGC") has been asked to determine whether this corporation has any jurisdiction over the above plan, which is at present the subject of the application of your client, Chase Manhattan Bank, for appointment of an appropriate person to effect final windup of the plan and distribution of assets held by Chase Manhattan Bank as trustee.

We have discussed the possibility that if the plan were a covered defined benefit pension plan which terminated on or after September 2, 1974, the PBGC would seek to intervene and remove the pending application from state to federal district court. The PBGC's intervention would seek appointment of a trustee to administer the plan under §4042 of the Employee Retirement Income Security Act, 29 U.S.C. §1342 (Supp. IV, 1974) ("the Act"), or both appointment of a trustee and termination under that provision of the Act.

The PBGC has determined that, based upon the information you gave me by telephone on August 4 and you submitted in your letters, coupled with information from Mr. Goldman, attorney for some plan participants, conveyed in an August 10 phone call, the subject pension plan terminated well before the September 3, 1974 date on which Federal Sweets & Biscuit Co. ("the Company") was adjudicated bankrupt.

Addendum 5

- 2 -

We have learned from Mr. Goldman that the plant ceased operations in the summer of 1972. You informed me that the Company's last contribution to the trust was made on April 9, 1970, as evidenced by the accounting submitted with your application. Since benefits accrued based on actual service, benefit accruals ceased as of the next half year. Thereafter, according to an exhibit to your application, the Company's certificate of incorporation became inoperative and void under the laws of Delaware on April 15, 1973. Another exhibit shows that the company was adjudicated bankrupt on September 3, 1974, having filed for bankruptcy on April 8, 1971.

In these circumstances, the only event related to plan activity occurring after the September 2, 1974 effective date of this Act was the adjudication of bankruptcy on September 3. All the indicia of plan activity - work by participants, operation of the plant, benefit accruals, and employer contributions - ceased between 1970 and 1972. Accordingly, the discharge in bankruptcy alone does not demonstrate that the plan terminated on September 3, 1974.

Based on the foregoing determination, the Act does not give the PBGC any interest in the final termination, or wind-up, procedure you have initiated. We will not, therefore, undertake to intervene in the pending state court proceedings or other proceedings related thereto.

Thank you for your cooperation.

Cordially,


Christine O. Cook

Attorney

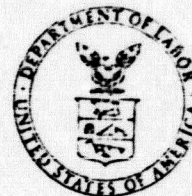
Office of the General Counsel

cc: Harold Goldman, Esq.
Goldman, Carlet, Garrison & Bertoni
925 Clifton Avenue
Clifton, N. J.

Ms. Monica Gallagher
Plan Benefits Security Division
Office of the Solicitor
U. S. Department of Labor
Washington, DC 20210
Attn: Jerome Cohen, Esq.

Addendum 6
U. S. DEPARTMENT OF LABOR
LABOR-MANAGEMENT SERVICES ADMINISTRATION
1818 BROADWAY
NEW YORK, NEW YORK 10038

OFFICE OF
THE REGIONAL ADMINISTRATOR



March 18, 1976

John H. Kelly, Esq.
Milbank, Tweed, Hadley & McCloy
1211 Avenue of the Americas
New York, New York 10036

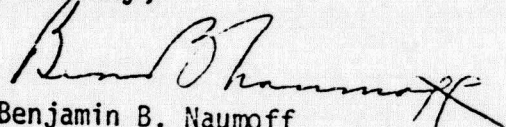
Re: Federal Sweets Pension Trust
Case No. 30-6046

Dear Mr. Kelly:

If you decide to take the court route regarding the distribution of assets of the trust I would appreciate it if you would make certain that I receive a copy of the formal papers.

I would like to terminate our interest in this case as soon as you initiate formal proceedings.

Sincerely,


Benjamin B. Naumoff
Regional Administrator

U.S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20210



SEP 30 1976

The Honorable Abraham Gellinoff
Supreme Court of the State of New York
In and For New York County
Special Term Part I
County Court House
Foley Square
New York, New York 10007

Re: In the Matter of the Application of the
Chase Manhattan Bank (National Association), as
Trustee under the Provisions of a Trust Agreement
with Federal Sweets and Biscuit Co., Inc.
Supreme Court of the State of New York
Index No. 13554-76

Dear Judge Gelinoff:

The Secretary of Labor is charged with responsibility
for the enforcement of Title I of the Employee Retirement
Income Security Act of 1974 (ERISA).

It has recently come to our attention that in the above-
styled litigation pending before your court, the Chase
Manhattan Bank (National Association) ("Chase") seeks,
inter alia, an adjudication that its account for the
year 1975 of the employee benefit trust fund of which
it is trustee should be judicially approved.

In our view, which we have conveyed to counsel for Chase
by the correspondence of which copies are enclosed, this
is a cause of action arising after January 1, 1975, in
connection with which Title I of ERISA preempts, with
exceptions not here relevant, all state law, 29 U.S.C.
1144, and over which, accordingly, jurisdiction lies
exclusively in the federal courts, 29 U.S.C. 1132(e)(1).

Counsel for Chase has apparently conveyed to the court's
clerk information to the effect that the Department has
some interest in this proceeding. Because in our view

Me. GOLDMAN

the court is without jurisdiction over that portion of the action which relates to periods after January 1, 1975 (the only portion which concerns us), we cannot appropriately seek to participate in the proceeding pending now before the court. However, in the interest of clarity and because we believe the court would wish to examine its own jurisdiction even in the absence of a challenge thereto by a party litigant, we have taken the liberty to invite the court's attention to the aforementioned provisions of federal law and to enclose the attached correspondence.

Sincerely,

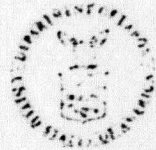


Steven J. Sacher
Associate Solicitor
Plan Benefits Security Division

Enclosures

U.S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20110

SEP 30 1976



Kenneth A. Perko, Jr., Esq.
Milbank, Tweed, Hadley & McCloy
1 Chase Manhattan Plaza
New York, New York 10005

Re: Application of the Chase Manhattan Bank (National Association), as Trustee under the Provisions of a Trust Agreement with Federal Sweets and Biscuit Company, Inc., Supreme Court of the State of New York, Index No. 13554-76

Dear Mr. Perko:

Thank you for your letter of September 20, 1976.

As you are aware, it is our view that the Supreme Court of the State of New York lacks jurisdiction over a portion of the captioned matter; and that portion is the only aspect of the litigation in which the Secretary has an interest. Accordingly, and as I indicated in our telephone conversation on September 16, and as I believe Mr. Cohen has also attempted to make clear, it is extremely unlikely that any formal submission will be made in that litigation by the Secretary of Labor.

Inasmuch as you have apparently made the court aware of this Department's interest, I have undertaken to furnish the court with copies of our correspondence to date. A copy of the covering letter is attached. I would appreciate your sending on the enclosed extra copies of this letter, its enclosure and the previous correspondence to Messrs. Goldman and Goodstein (whom you copied with your letter of the 20th), whose addresses are not conveniently available to me.

Sincerely,

A handwritten signature in cursive script, reading "Monica Gallagher", is written over the typed name.

Monica Gallagher
Counsel for Litigation
Plan Benefits Security Division

Enclosures

MILBANK, TWEED, HADLEY & MCCLOY

1 CHASE MANHATTAN PLAZA
NEW YORK, N.Y. 10005

TELEPHONE: 212 HANOVER 2-2630

TELEX 12-5595
I. T. T. 422962

CABLE ADDRESS: MILTWEED NEW YORK

MIDTOWN OFFICE
120 AVENUE OF THE AMERICAS
NEW YORK, N.Y. 10036
212 HANOVER 2-2600

September 20, 1976

Re: Application of the Chase Manhattan Bank
(National Association), as Trustee Under
the Provisions of a Trust Agreement with
Federal Sweets and Biscuit Company, Inc.
Supreme Court of the State of New York
Index No. 13554-76

Ms. Monica Gallagher
Plan Benefits Security Division
Office of the Solicitor
U.S. Department of Labor
Washington, D.C. 20210

Dear Ms. Gallagher:

Thank you for your letter of September 16, 1976.

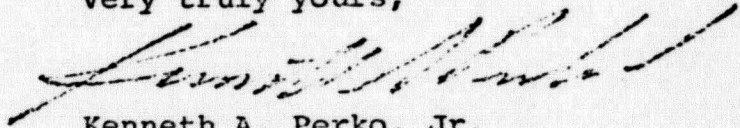
As I explained to Mr. Cohen last Friday, Judge Gellinoff declined to grant an adjournment of the captioned proceeding much to our surprise. We spoke with the appropriate court clerk, however, and were advised that, upon formal request, the matter could be held in abeyance pending submission of memoranda with respect to the points raised by Mr. Hutchinson. We expect to hear from Mr. Cohen early this week whether or not he wishes to seek such additional time.

Neither Mr. Goldman nor Mr. Weinstein have any

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12-11

objections to affording your department such time as it may require to present its position to the court. We hope to hear from you promptly in this regard.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'Kenneth A. Perko, Jr.', with a stylized, cursive script.

Kenneth A. Perko, Jr.

KAP:lg

cc: Harold Goldman
William Goodstein

SEP 18 1978

Graneth A. Perko, Jr., Esq.
Milbank, Tweed, Hadley & McCloy
One Chase Manhattan Plaza
New York, New York 10005

Re Application of the Chase Manhattan Bank
(National Association), as Trustee Under
the Provisions of a Trust Agreement with
Federal Savings and Loan Company, Inc.
Supreme Court of the State of New York
Index No. 11681-78

Dear Mr. Perko:

This will confirm my understanding based on our
telephone conversation yesterday that you intend
to seek a continuance of 60 days in the proceeding
now pending in the New York courts, and that you
anticipate no objection by other parties and no
difficulties in obtaining such a continuance from
the court.

Since our conversation yesterday, your letter of
September 12 to James D. Hutchinson, Administrator,
Pension and Welfare Benefit Programs, arrived, and
I have discussed with Mr. Hutchinson both the letter
and the matters we discussed on the telephone. I
expect to be in touch with you further when we have
determined the course of action we will pursue.

Sincerely,

Monica Gallagher
Counsel for Litigation
Plan Benefits Security Division

BEST COPY AVAILABLE

ADDENDUM 13

September 13, 1976

Mr. James D. Hutchinson
Administrator
Pension and Welfare Benefit Programs
U.S. Department of Labor
Labor-Management Services Administration
Washington, D.C. 20216

Dear Mr. Hutchinson:

This will acknowledge receipt of your letter of September 7, 1976, copies of which we have forwarded to Messrs. Goldman and Goodstein.

After consideration of the matters set forth in your letter, we wish to advise you that we do not intend to withdraw the petition. Nor do we believe that it requires any modification at this stage.

Should your department require additional time to prepare its response to the petition, we would have no objection to any reasonable adjournment of the September 17, 1976 hearing date.

Very truly yours,

Kenneth A. Perko, Jr.

NAP:lg
cc: Harold Goldman
William Goodstein

Addendum 14

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C. 20535

SEP 7 1976

Kenneth A. Perko, Jr., Esq.
Milbank, Tweed, Hadley & McCloy
One Chase Manhattan Plaza
New York, New York 10005

Re: In the Matter of the Application of The
Chase Manhattan Bank (National Association),
as Trustee Under The Provisions of a Trust
Agreement With Federal Sweets and Biscuit
Company, Inc.
Supreme Court of the State of New York
Index No. 13554-76

Dear Mr. Perko:

It has come to my attention that The Chase Manhattan Bank (National Association) (hereinafter "Chase") has filed a Petition in the Supreme Court of the State of New York for the issuance of an Order to Show Cause why it should not be released and discharged as trustee of an employee pension benefit plan, the Pension Plan for Wage Employees of Federal Sweets and Biscuit Company, Inc., and further that on July 27, 1976 such an Order did issue in which, among other things, the Court scheduled a hearing in the matter for September 17, 1976.

I am advised that Chase has sought a suitable method for winding up the affairs of this plan, by which the plan's assets might be allocated properly, and that Chase has been in contact with the New York Regional Office of this Department, among others, in connection with this matter. I wish to acknowledge also the cooperation of your firm in providing our attorneys, after this matter was recently brought to their attention, with copies of the Petition, the supporting exhibits, the Intermediate Account submitted by the Bank, and the Order and a revision thereof.

It is provided in section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 5144(a) that:

"Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a), and not exempt under section 4(b). This section shall take effect on January 1, 1975."

The exceptions set forth in subsection (b) of section 514 exempt only causes of action which arose before January 1, 1975; state laws regulating insurance, banking, or securities; and state criminal laws. It does not appear that any of these provisions of subsection (b) will save those provisions of the laws of New York here in question from the superseding effect of subsection (a) of section 514, at least for that portion of the action which requires adjudication with respect to activities engaged in by Chase during or after 1975. Section 7701 of Article 77 of the Civil Practice Law and Rules of the State of New York, "Special proceeding relating to express trust," is not a law which regulates insurance, banking, or securities, and is not a generally applicable criminal law.

With respect to the date on which the instant cause of action arose, the petition prays for an Order to Show Cause why the Intermediate Account of Chase Manhattan Bank for the calendar years 1970-1975 should not be judicially settled and allowed. Accordingly, the Intermediate Account submitted to the Supreme Court of the State of New York by the Chase Manhattan Bank renders an account of its proceedings as trustee from January 1, 1970 to December 31, 1975. A petition for judicial approval of trustee conduct, which conduct occurred throughout 1975, could not have arisen before January 1, 1975. Thus, while a separate petition for state court settlement and allowance of this account for a period up to and including December 31, 1974 might not be inconsistent with section 514(a), this particular action, seeking approval of 1975 conduct, is in our view inconsistent with that provision of ERISA.

Addendum 16

For the foregoing reasons, it would seem appropriate for Chase to withdraw the petition in this case or to modify it so that it relates only to a period up to and including December 31, 1974.

In light of the hearing date set by the state court, I would request your earliest possible advice as to whether Chase will, in this matter, seek an Order covering any period after December 31, 1974, and as to the statutory provisions which you deem controlling, in the event that they are different from those mentioned here. Please let me know if we can provide any further information. Thank you for your cooperation in this matter.

Sincerely,

JAMES D. HUTCHINSON
Administrator
Pension and Welfare Benefit Programs

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